

Commodity Futures Trading Commission

§ 36.3

(ii) A certification that the information contained in the previous Notification of Operation as an Exempt Board of Trade is still correct.

[66 FR 42270, Aug. 10, 2001, as amended at 71 FR 1961, Jan. 12, 2006; 77 FR 66336, Nov. 2, 2012]

§ 36.3 Exempt commercial markets.

(a) *Eligible transactions.* Agreements, contracts or transactions in an exempt commodity eligible to be entered into on an exempt commercial market must be:

(1) Entered into on a principal-to-principal basis solely between persons that are eligible commercial entities, as that term is defined in section 1a(17) of the Act, at the time the persons enter into the agreement, contract or transaction; and

(2) Executed or traded on an electronic trading facility.

(b) *Notification.* An electronic trading facility relying upon the exemption set forth in this section shall maintain on file with the Secretary of the Commission at the Commission's Washington, DC headquarters, in electronic form, a "Notification of Operation as an Exempt Commercial Market," and it shall include the information and certifications specified in this section.

(c) *Required information*—(1) *All electronic trading facilities.* A facility operating in reliance on the exemption set forth in this section on an on-going basis, must:

(i) Provide the Commission with the terms and conditions, as defined in § 40.1(i) of this chapter and product descriptions for each agreement, contract or transaction listed by the facility in reliance on the exemption set forth in this section, as well as trading conventions, mechanisms and practices;

(ii) Provide the Commission with information explaining how the facility meets the definition of "trading facility" contained in section 1a(51) of the Act and provide the Commission with access to the electronic trading facility's trading protocols, in a format specified by the Commission;

(iii) Demonstrate to the Commission that the facility requires, and will require, with respect to all current and future agreements, contracts and transactions, that each participant

agrees to comply with all applicable laws; that the authorized participants are "eligible commercial entities" as defined in section 1a(17) of the Act; that all agreements, contracts and transactions are and will be entered into solely on a principal-to-principal basis; and that the facility has in place a program to routinely monitor participants' compliance with these requirements;

(iv) At the request of the Commission, provide any other information that the Commission, in its discretion, deems relevant to its determination whether an agreement, contract, or transaction performs a significant price discovery function; and

(v) File with the Commission annually, no later than the end of each calendar year, a completed copy of CFTC Form 205—Exempt Commercial Market Annual Certification. The information submitted in Form 205 shall include:

(A) A statement indicating whether the electronic trading facility continues to operate under the exemption; and

(B) A certification that affirms the accuracy of and/or updates the information contained in the previous Notification of Operation as an Exempt Commercial Market.

(2) *Electronic trading facilities trading or executing agreements, contracts or transactions other than significant price discovery contracts.* In addition to the requirements of paragraph (c)(1) of this section, a facility operating in reliance on the exemption set forth in this section, with respect to agreements, contracts or transactions that have not been determined to perform significant price discovery function, on an on-going basis must:

(i) Identify to the Commission those agreements, contracts and transactions conducted on the electronic trading facility with respect to which it intends, in good faith, to rely on the exemption set forth in this section, and which averaged five trades per day or more over the most recent calendar quarter; and, with respect to such agreements, contracts and transactions, either:

(A) Submit to the Commission, in a form and manner acceptable to the Commission, a report for each business

day. Each such report shall be electronically transmitted weekly, within such time period as is acceptable to the Commission after the end of the week to which the data applies, and shall show for each agreement, contract or transaction executed the following information:

(1) The underlying commodity, the delivery or price-basing location specified in the agreement, contract or transaction maturity date, whether it is a financially settled or physically delivered instrument, and the date of execution, time of execution, price, and quantity;

(2) Total daily volume and, if cleared, open interest;

(3) For an option instrument, in addition to the foregoing information, the type of option (*i.e.*, call or put) and strike prices; and

(4) Such other information as the Commission may determine; or

(B) Provide to the Commission, in a form and manner acceptable to the Commission, electronic access to those transactions conducted on the electronic trading facility in reliance on the exemption set forth in this section, and meeting the average five trades per day or more threshold test of this section, which would allow the Commission to compile the information set forth in paragraph (c)(2)(i)(A) of this section and create a permanent record thereof.

(ii) Maintain a record of allegations or complaints received by the electronic trading facility concerning instances of suspected fraud or manipulation in trading activity conducted in reliance on the exemption set forth in this section. The record shall contain the name of the complainant, if provided, date of the complaint, market instrument, substance of the allegations, and name of the person at the electronic trading facility who received the complaint;

(iii) Provide to the Commission, in the form and manner prescribed by the Commission, a copy of the record of each complaint received pursuant to paragraph (c)(2)(ii) of this section that alleges, or relates to, facts that would constitute a violation of the Act or Commission regulations. Such copy shall be provided to the Commission no

later than 30 calendar days after the complaint is received; *Provided, however*, that in the case of a complaint alleging, or relating to, facts that would constitute an ongoing fraud or market manipulation under the Act or Commission rules, such copy shall be provided to the Commission within three business days after the complaint is received; and

(iv) Provide to the Commission on a quarterly basis, within 15 calendar days of the close of each quarter, a list of each agreement, contract or transaction executed on the electronic trading facility in reliance on the exemption set forth in this section and indicate for each such agreement, contract or transaction the contract terms and conditions, the contract's average daily trading volume, and the most recent open interest figures.

(3) *Electronic trading facilities trading or executing significant price discovery contracts.* In addition to the requirements of paragraph (c)(1) of this section, if the Commission determines that a facility operating in reliance on the exemption set forth in this section trades or executes an agreement, contract or transaction that performs a significant price discovery function, the facility must, with respect to any significant price discovery contract, publish and provide to the Commission the information required by §16.01 of this chapter.

(4) *Delegation of authority.* The Commission hereby delegates, until the Commission orders otherwise, the authority to determine the form and manner of submitting the required information under paragraphs (c)(1) through (3) of this section, to the Director of the Division of Market Oversight and such members of the Commission's staff as the Director may designate. The Director may submit to the Commission for its consideration any matter that has been delegated by this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph (c)(4).

(5) *Special calls.* (i) All information required upon special call of the Commission shall be transmitted at the same time and to the office of the Commission as may be specified in the call.

(ii) Such information shall include information related to the facility's business as an exempt electronic trading facility in reliance on the exemption set forth in this section, including information relating to data entry and transaction details in respect of transactions entered into in reliance on the exemption, as the Commission may determine appropriate—

(A) To enforce the antifraud and anti-manipulation provisions in the Act and Commission regulations, and

(B) To evaluate a systemic market event; or

(C) To obtain information requested by a Federal financial regulatory authority in order to enable the regulator to fulfill its regulatory or supervisory responsibilities.

(iii) The Commission hereby delegates, until the Commission orders otherwise, the authority to make special calls to the Directors of the Division of Market Oversight, the Division of Clearing and Risk, the Division of Swap Dealer and Intermediary Oversight, and the Division of Enforcement to be exercised by each such Director or by such other employee or employees as the Director may designate. The Directors may submit to the Commission for its consideration any matter that has been delegated in this paragraph. Nothing in this paragraph prohibits the Commission, at its election, from exercising the authority delegated in this paragraph (c)(5).

(6) *Subpoenas to foreign persons.* A foreign person whose access to an electronic trading facility is limited or denied at the direction of the Commission based on the Commission's belief that the foreign person has failed timely to comply with a subpoena shall have an opportunity for a prompt hearing under the procedures provided in § 21.03(b) and (h) of this chapter.

(7) *Prohibited representation.* An electronic trading facility relying upon the exemption set forth in this section, with respect to agreements, contracts or transactions that are not significant price discovery contracts, shall not represent to any person that it is registered with, designated, recognized, licensed or approved by the Commission.

(d) *Significant price discovery contracts—*(1) *Criteria for significant price*

discovery determination. The Commission may determine, in its discretion, that an electronic trading facility operating a market in reliance on the exemption set forth in this section performs a significant price discovery function for transactions in the cash market for a commodity underlying any agreement, contract or transaction executed or traded on the facility. In making such a determination, the Commission shall consider, as appropriate:

(i) *Price linkage.* The extent to which the agreement, contract or transaction uses or otherwise relies on a daily or final settlement price, or other major price parameter, of a contract or contracts listed for trading on or subject to the rules of a designated contract market, or a significant price discovery contract traded on an electronic trading facility, to value a position, transfer or convert a position, cash or financially settle a position, or close out a position;

(ii) *Arbitrage.* The extent to which the price for the agreement, contract or transaction is sufficiently related to the price of a contract or contracts listed for trading on or subject to the rules of a designated contract market, or a significant price discovery contract or contracts trading on or subject to the rules of an electronic trading facility, so as to permit market participants to effectively arbitrage between the markets by simultaneously maintaining positions or executing trades in the contracts on a frequent and recurring basis;

(iii) *Material price reference.* The extent to which, on a frequent and recurring basis, bids, offers, or transactions in a commodity are directly based on, or are determined by referencing, the prices generated by agreements, contracts or transactions being traded or executed on the electronic trading facility;

(iv) *Material liquidity.* The extent to which the volume of agreements, contracts or transactions in the commodity being traded on the electronic trading facility is sufficient to have a material effect on other agreements, contracts or transactions listed for trading on or subject to the rules of a

designated contract market or an electronic trading facility operating in reliance on the exemption set forth in this section;

(v) *Other material factors.* [Reserved]

(2) *Notification of possible significant price discovery contract conditions.* An electronic trading facility operating in reliance on the exemption set forth in this section shall promptly notify the Commission, and such notification shall be accompanied by supporting information or data concerning any contract that:

(i) Averaged five trades per day or more over the most recent calendar quarter; and

(ii)(A) For which the exchange sells its price information regarding the contract to market participants or industry publications; or

(B) Whose daily closing or settlement prices on 95 percent or more of the days in the most recent quarter were within 2.5 percent of the contemporaneously determined closing, settlement or other daily price of another agreement, contract or transaction.

(3) *Procedure for significant price discovery determination.* Before making a final price discovery determination under this paragraph, the Commission shall publish notice in the FEDERAL REGISTER that it intends to undertake a determination with respect to whether a particular agreement, contract or transaction performs a significant price discovery function and to receive written data, views and arguments relevant to its determination from the electronic trading facility and other interested persons. Any such written data, views and arguments shall be filed with the Secretary of the Commission, in the form and manner specified by the Commission, within 30 calendar days of publication of notice in the FEDERAL REGISTER or within such other time specified by the Commission. After prompt consideration of all relevant information, the Commission shall, within a reasonable period of time after the close of the comment period, issue an order explaining its determination whether the agreement, contract or transaction executed or traded by the electronic trading facility performs a significant price discovery function under the criteria

specified in paragraph (d)(1)(i) through (v) of this section.

(4) *Compliance with core principles.* (i) Following the issuance of an order by the Commission that the electronic trading facility executes or trades an agreement, contract or transaction that performs a significant price discovery function, the electronic trading facility must demonstrate, with respect to that agreement, contract or transaction, compliance with the Core Principles set forth in this section and the applicable provisions of this part. If the Commission's order represents the first time it has determined that one of the electronic trading facility's agreements, contracts or transactions performs a significant price discovery function, the facility must submit a written demonstration of compliance with the Core Principles within 90 calendar days of the date of the Commission's order. For each subsequent determination by the Commission that the electronic trading facility has an additional agreement, contract or transaction that performs a significant price discovery function, the facility must submit a written demonstration of compliance with the Core Principles within 30 calendar days of the date of the Commission's order. Attention is directed to appendix B of this part for guidance on and acceptable practices for complying with the Core Principles. Submissions demonstrating how the electronic trading facility complies with the Core Principles with respect to its significant price discovery contract must be filed with the Secretary of the Commission at its Washington, DC headquarters. Submissions must include the following:

(A) A written certification that the significant price discovery contract(s) complies with the Act and regulations thereunder;

(B) A copy of the electronic trading facility's rules (as defined in §40.1 of this chapter) and any technical manuals, other guides or instructions for users of, or participants in, the market, including minimum financial standards for members or market participants. Subsequent rule changes must be certified by the electronic trading facility pursuant to section

5c(c) of the Act and §40.6 of this chapter. The electronic trading facility also may request Commission approval of any rule changes pursuant to section 5c(c) of the Act and §40.5 of this chapter;

(C) A description of the trading system, algorithm, security and access limitation procedures with a timeline for an order from input through settlement, and a copy of any system test procedures, tests conducted, test results and contingency or disaster recovery plans;

(D) A copy of any documents pertaining to or describing the electronic trading system's legal status and governance structure, including governance fitness information;

(E) An executed or executable copy of any agreements or contracts entered into or to be entered into by the electronic trading facility, including partnership or limited liability company, third-party regulatory service, or member or user agreements, that enable or empower the electronic trading facility to comply with a Core Principle;

(F) A copy of any manual or other document describing, with specificity, the manner in which the trading facility will conduct trade practice, market and financial surveillance;

(G) To the extent that any of the items in paragraphs (d)(4)(i)(A) through (F) of this section raise issues that are novel, or for which compliance with a Core Principle is not self-evident, an explanation of how that item satisfies the applicable Core Principle or Principles.

(ii) The electronic trading facility must identify with particularity information in the submission that will be subject to a request for confidential treatment pursuant to §145.09 of this chapter. The electronic trading facility must follow the procedures specified in §40.8 of this chapter with respect to any information in its submission for which confidential treatment is requested.

(5) *Determination of compliance with core principles.* The Commission shall take into consideration differences between cleared and uncleared significant price discovery contracts when reviewing the implementation of the

Core Principles by an electronic trading facility. The electronic facility has reasonable discretion in accounting for differences between cleared and uncleared significant price discovery contracts when establishing the manner in which it complies with the Core Principles.

(6) *Information relating to compliance with core principles.* Upon request by the Commission, an electronic trading facility trading a significant price discovery contract shall file with the Commission a written demonstration, containing such supporting data, information and documents, in the form and manner and within such time as the Commission may specify, that the electronic trading facility is in compliance with one or more Core Principles as specified in the request, or that is otherwise requested by the Commission to enable the Commission to satisfy its obligations under the Act.

(7) *Enforceability.* An agreement, contract or transaction entered into on or pursuant to the rules of an electronic trading facility trading or executing a significant price discovery contract shall not be void, voidable, subject to rescission or otherwise invalidated or rendered unenforceable as a result of:

(i) A violation by the electronic trading facility of the provisions set forth in this section; or

(ii) Any Commission proceeding to alter or supplement a rule, term or condition under section 8a(7) of the Act, to declare an emergency under section 8a(9) of the Act, or any other proceeding the effect of which is to alter, supplement or require an electronic trading facility to adopt a specific term or condition, trading rule or procedure, or to take or refrain from taking a specific action.

(8) *Procedures for vacating a determination of a significant price discovery function—(i) By the electronic trading facility.* An electronic trading facility that executes or trades an agreement, contract or transaction that the Commission has determined performs a significant price discovery function under paragraph (d)(3) of this section may petition the Commission to vacate that determination. The petition shall demonstrate that the agreement, contract or transaction no longer performs a

significant price discovery function under the criteria specified in paragraph (d)(1), and has not done so for at least the prior 12 months. An electronic trading facility shall not petition for a vacation of a significant price discovery determination more frequently than once every 12 months for any individual contract.

(ii) *By the Commission.* The Commission may, on its own initiative, begin vacation proceedings if it believes that an agreement, contract or transaction has not performed a significant price discovery function for at least the prior 12 months.

(iii) *Procedure.* Before making a final determination whether an agreement, contract or transaction has ceased to perform a significant price discovery function, the Commission shall publish notice in the FEDERAL REGISTER that it intends to undertake such a determination and to receive written data, views and arguments relevant to its determination from the electronic trading facility and other interested persons. Written submissions shall be filed with the Secretary of the Commission in the form and manner specified by the Commission, within 30 calendar days of publication of notice in the FEDERAL REGISTER, or within such other time specified by the Commission. After consideration of all relevant information, the Commission shall issue an order explaining its determination whether the agreement, contract or transaction has ceased to perform a significant price discovery function and, if so, vacating its prior order. If such an order issues, and the Commission subsequently determines, on its own initiative or after notification by the electronic trading facility, that the agreement, contract or transaction that was subject to the vacation order again performs a significant price discovery function, the electronic trading facility must comply with the Core Principles within 30 calendar days of the date of the Commission's order.

(iv) *Automatic vacation of significant price discovery determination.* Regardless of whether a proceeding to vacate has been initiated, any significant price discovery contract that has no open interest and in which no trading has occurred for a period of 12 complete and

consecutive calendar months shall, without further proceedings, no longer be considered to be a significant price discovery contract.

(e) *Commission review.* The Commission shall, at least annually, evaluate as appropriate agreements, contracts or transactions conducted on an electronic trading facility in reliance on the exemption set forth in this section to determine whether they serve a significant price discovery function as set forth in paragraph (d)(1) of this section.

[77 FR 66336, Nov. 2, 2012]

APPENDIX A TO PART 36—GUIDANCE ON SIGNIFICANT PRICE DISCOVERY CONTRACTS

1. There are four factors that the Commission must consider, as appropriate, in making a determination that a contract is performing a significant price discovery function. The four factors prescribed by the statute are: Price Linkage; Arbitrage; Material Price Reference; and Material Liquidity.

2. Not all listed factors must be present to support a determination that a contract performs a significant price discovery function. Moreover, the statutory language neither prioritizes the factors nor specifies the degree to which a significant price discovery contract must conform to the various factors. Congress has indicated that it intends that the Commission should not make a determination that an agreement, contract or transaction performs a significant price discovery function on the basis of the Price Linkage factor unless the agreement, contract or transaction also has sufficient volume to impact other regulated contracts or to become an independent price reference or benchmark that is regularly utilized by the public. The Commission believes that the Arbitrage and Material Price Reference factors can be considered separately from each other. That is, the Commission could make a determination that a contract serves a significant price discovery function based on the presence of one of these factors and the absence of the other. The presence of any of these factors, however, would not necessarily be sufficient to establish the contract as a significant price discovery contract. The fourth factor, Liquidity, would be considered in conjunction with the arbitrage and linkage factors as a significant amount of liquidity presumably would be necessary for a contract to perform a significant price discovery function in conjunction with these factors.

3. These factors do not lend themselves to a mechanical checklist or formulaic analysis. Accordingly, this guidance is intended to illustrate which factors, or combinations